

**CRIMINAL SALE OF A FIREARM
IN THE THIRD DEGREE
(Possesses Firearm with Intent to Sell)
Penal Law § 265.11 (2)
(Committed on or after Nov. 1, 1999)
(Revised July 2016 and Dec 2022)¹**

The (*specify*) count is Criminal Sale of a Firearm in the Third Degree.

Under our law, a person is guilty of Criminal Sale of a Firearm in the Third Degree when that person is not authorized pursuant to law to possess a firearm and he or she knowingly² and unlawfully possesses a firearm with the intent to sell it.

The following terms used in that definition have a special meaning:

A FIREARM means any pistol or revolver.³

¹ In July 2016 and December 2022, the instruction on the definition of “knowingly” was revised to better state the applicable law.

² The word “knowingly” has been added to this definition to comport with statutory law (see Penal Law § § 15.00(2) and 15.05 [2]) and with case law. *People v Persce*, 204 NY 397, 402 (1912) (“the possession [of a slungshot] which is meant is a knowing and voluntary one”); *People v Saunders*, 85 NY2d 339, 341-42 (1995) (“‘Possession,’ as part of the forbidden act, includes the Penal Law definitional component of ‘[v]oluntary act,’ which incorporates the attribute of awareness of the possession or control Thus, the corpus delicti of weapons possession . . . is the voluntary, aware act of the possession of a weapon”); *People v Ford*, 66 NY2d 428, 440 (1985) (the offense of possession of a loaded firearm requires that the possession be knowing).

³ Penal Law § 265.00 (3). The statutory definition of a “firearm” includes other weapons. If, therefore, a firearm, other than a pistol or revolver, is in issue, see “DEFINITION OF FIREARM AS OTHER THAN A PISTOL OR REVOLVER” in “Additional Charges” at the end of the Table of Contents for Penal Law article 265 crimes.

A person is NOT AUTHORIZED PURSUANT TO LAW TO POSSESS A FIREARM when that person has no legal right to possess it.⁴ Under our law, with certain exceptions not applicable here, a person has no legal right to possess a firearm.⁵

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁶

⁴ See Penal Law article 400.

⁵ In *People v. Tatis*, 170 A.D.3d 45 (1st Dept 2019), the Appellate Division reviewed NYC Administrative Code § 10-131(i)(3) that prohibits the possession of a pistol or revolver within the City by “any person not authorized to possess” same and held that the quoted language “constitutes an exception and not a proviso. Consequently, it was the People's burden to prove that the defendant was not authorized to possess a pistol or revolver within the City of New York.” Parallel language appears in the definition of the instant Penal Law crime. *Tatis*, however, distinguished Penal Law firearm crimes:

“The People point to Penal Law section 265.20, which is a catalogue of exemptions to various Penal Law weapon provisions, including one for ‘[p]ossession of a pistol or revolver by a person to whom a license therefor has been issued . . .’ (Penal Law § 265.20[a][3]). These exemptions must be raised by a defendant in the first instance before the prosecution is required to disprove them beyond a reasonable doubt. However, the People's reliance on Penal Law section 265.20 and such exemptions is unavailing as that section is distinguishable from the statute at issue in this case. Because the exemptions in Penal Law section 265.20 are found outside the particular Penal Law provisions to which they apply, interpreting them to require an initial showing by a defendant is consistent with the interpretive principles traditionally used to differentiate between exceptions and provisos. The same is not true in this case, where the exclusionary language is contained entirely within section 10-131(i)(3) itself and, under a plain reading, forms an element of the offense which the People were required to disprove” (citations omitted).

⁶ Penal Law § 10.00 (8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, insert the appropriate instruction as found in the "Additional Charges" section at the end of this chapter.

A person KNOWINGLY possesses firearm when that person is aware that he or she is in possession of an object that is (specify).⁷ That person need not know (that is, be aware of) the object's name or that it meets the definition of firearm.⁸

Under this count, the firearm need not be loaded but it must be operable. To be operable, a firearm must be capable of discharging ammunition. A person in possession of a firearm is not required to know that the firearm was operable.⁹]

7 See Penal Law § 15.05(2). For an expanded instruction on the definition of “knowingly,” see Instructions of General Applicability, Culpable Mental States, Knowingly.

8 See *People v Parrilla*, 27 N.Y.3d 400, 405 (2016) (when possession of a gravity knife was a crime, defendants were required to know that “they possessed a knife” but the People were not required “to prove that defendants knew that the knife in their possession met the statutory definition of a gravity knife”); *People v Hernandez*, 180 AD3d 1234, 1237 (3d Dept 2020) (“Contrary to defendant’s contention, the court was not required to instruct the jury that the People were required to show that defendant was aware of the legal definition of a blackjack. The characteristics of the blackjack at issue—a lead core, surrounded by leather, which is flexible and used as a weapon—make ‘the inherently dangerous nature of the prohibited object be readily apparent, so as to put [defendant] on clear notice that the object is potentially subject to government regulation or prohibition’ Accordingly, the People did not have to prove that defendant was aware of the statutory definition of a blackjack”); *People v Steinmetz*, 177 AD3d 1292, 1293 (4th Dept 2019) (“The People were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles”); *People v Abdullah*, 206 AD3d 1340, 1344 (3d Dept 2022) (knowing possession of a slungshot is required but a defendant need not know the dictionary definition of slungshot).

⁹ Case law has added “operability” of a firearm as an element of the crime (see *People v Longshore*, 86 NY2d 851, 852 [1995]), but has further held that there is no requirement that the possessor know the firearm was operable. See *Parrilla* at 405 [“Defendants need only knowingly possess a firearm, they need not know that the firearm was loaded or operable”]; *People v Saunders*, 85 NY2d 339, 341-342 [1995]; *People v Ansare*, 96 AD2d 96, 97 [4th Dept 1983]). In December 2022, the last sentence was substituted for: “The defendant is not required to know that the firearm was operable.”

A person UNLAWFULLY possesses a firearm when that person has no legal right to possess a firearm.¹⁰ Under our law, with certain exceptions not applicable here, a person has no legal right to possess a firearm.

INTENT means conscious objective or purpose. Thus, a person possesses a firearm with intent to sell it when his or her conscious objective or purpose is to sell the firearm.¹¹

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, each of the following four elements:

1. That on or about (date), in the county of (County), the defendant, (defendant's name) was not authorized pursuant to law to possess a firearm;
2. That the defendant knowingly and unlawfully possessed a firearm;
3. That the defendant possessed that firearm with the intent to sell it; and
4. That the firearm was operable.

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

⁹ See Penal Law article 400.

¹⁰ See Penal Law § 15.05 (1).